



May 25, 2000

Ms. Kathleen F. Watel
Assistant City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR2000-2082

Dear Ms. Watel:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 136152.

The City of San Antonio (the "city") received a request for final reports relating to sexual harassment complaints against the city during a specified time interval. The requestor subsequently clarified the request to encompass "all . . . complaints (final dispositions) handled by the city." You claim that the requested information is excepted from disclosure under section 552.101 of the Government Code. We have considered the exception you claim and have reviewed the information that you submitted.

Initially we must address the city's failure to comply with section 552.301 of the Act in requesting this letter ruling. Section 552.301 provides, in relevant part, that a governmental body that seeks to withhold requested information from the public must "submit to the attorney general . . . a copy of the specific information requested, or submit representative samples of the information if a voluminous amount of information was requested[.]" Gov't Code § 552.301(e)(1)(D). If a governmental body undertakes to comply with section 552.301(e)(1)(D) by submitting representative samples, the submitted information must be genuinely representative of the requested information as a whole. *See* Open Records Decision Nos. 499 at 6 (1988), 497 at 4 (1988). If a governmental body fails to comply with section 552.301, the requested information is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold that information from the public. *See* Gov't Code § 552.302; *see also* *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

In this instance, you advise us that the city's files contain "copies of the documents it was required to submit to the EEOC in its investigations of charges of sexual harassment" and "documents that were used to formulate the City's responses to the EEOC." You inform us that "[s]ome of the documents requested contain highly embarrassing and intimate facts about the alleged sexual harasser and other victims, including their names and graphic descriptions of actions taken by the harasser." You state that "[n]ames and statements of witnesses are in the City's file." You assert that the city has submitted to this office "representative samples of the documents that are the subject of the request." The kind of information that you describe as being in the city's files nowhere appears in the records that you submitted to this office. Based on the significant discrepancy between the responsive information that you describe and the contents of the records that you submitted, we conclude that the submitted records do not constitute a representative sample of the responsive information that the city seeks to withhold. *See* Gov't Code § 552.301(e)(1)(D); Open Records Decision No. 497 at 4 (1988). Consequently, to the extent that the submitted records are not genuinely representative of responsive information held by the city, the city has failed to comply with section 552.301, and therefore requested information that differs substantially from the submitted records is presumed to be public. Gov't Code § 552.302. In the absence of any opportunity to review the unrepresented information, we are unable to determine whether there is any compelling reason to withhold any of that information from release. Accordingly, section 552.302 requires the release of requested information held by the city that differs substantially from the submitted information. We have no basis for determining whether information that was not submitted to this office is confidential; thus, we have no choice but to order that information released per section 552.302. If you believe that the information is confidential and may not lawfully be released, you must challenge this ruling in court as outlined below. We caution the city that chapter 552 of the Government Code makes the release of confidential information a criminal offense. *See* Gov't Code §§ 552.101, .352.

We now consider your claim that the responsive records that you submitted are confidential under section 552.101 of the Act. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional statutory, or by judicial decision." Gov't Code § 552.101. You claim that regulations promulgated by the Equal Employment Opportunity Commission ("EEOC") under the federal Privacy Act, 5 U.S.C. § 552a, prohibit the release of information relating to an EEOC investigation of alleged sexual harassment that is held by the city and that the city submitted to the EEOC. We disagree. On several occasions, this office has explained that the federal non-disclosure rules apply only to the EEOC and its officers and employees and do not govern the release of information held by a governmental body, such as the city, *as the employer*. *See, e.g.,* Open Records Decision Nos. 245 (1980), 155 (1977); *see also* 29 C.F.R. part 1611 (Privacy Act Regulations) (providing, in relevant part, that the federal privacy regulations apply to records maintained by the EEOC). Thus, none of the submitted information is confidential under section 552.101 in conjunction with federal law.

You also claim that the submitted records contain information that is confidential under section 552.101 in conjunction with the decision in *Morales v. Ellen*, 840 S.W.2d 519 (Tex. App. – El Paso 1992, writ denied). In *Ellen*, the court applied the common law right to privacy addressed in *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977), to an investigation of allegations of sexual harassment. The investigation files that were at issue in *Ellen* contained third-party witness statements, an affidavit in which the individual accused of the misconduct responded to the allegations, and the conclusions of the board of inquiry that conducted the investigation. See 840 S.W.2d at 525. The court upheld the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the disclosure of such documents sufficiently served the public's interest in the matter. *Id.* The court further held, however, that “the public does not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released.” *Id.* In accordance with *Ellen*, this office typically has required the release of a document analogous to the conclusions of the board of inquiry in *Ellen*, but has held that a governmental body must withhold both the identities of victims and witnesses of alleged sexual harassment and any information that would tend to identify such a victim or witness. See Open Records Decision Nos. 393 (1983), 339 (1982). In this instance, the submitted records appear to include names and addresses of victims of alleged sexual harassment. Under section 552.101 in conjunction with *Ellen*, that information is confidential and must be withheld. Otherwise, the submitted information is not protected under section 552.101. Accordingly, except for the identifying information that is confidential under *Ellen*, the submitted records are not excepted from disclosure and must be released.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

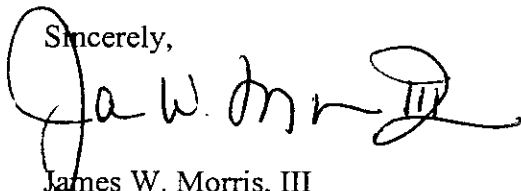
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records;

2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "J.W. Morris III". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

James W. Morris, III
Assistant Attorney General
Open Records Division

JWM/ljp

Ref: ID# 136152

Encl. Submitted documents

cc: Mr. Brian Collister
Reporter
KMOL-TV
1031 Navarro Street
San Antonio, Texas 78205
(w/o enclosures)